MOHAMAD SYAIFUDDIN AHMAD YASSIN A

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: 42-09-98-III (I)]
13 MARCH 2007

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Grounds of decision - Whether prosecution proved its case beyond reasonable doubt - Whether accused cast reasonable doubt for a discharge and an acquittal* C

CRIMINAL PROCEDURE: *Revision - Judgment, grounds of, unavailable - Whether decision of sessions court judge could be supported by evidences adduced - Whether prosecution proved its case beyond reasonable doubt - Whether accused cast reasonable doubt for a discharge and an acquittal* D

This was an appeal by the appellant-accused ('the accused') against the decision of the sessions court judge who had found the accused guilty and convicted him of an offence punishable under s. 394 of the Penal Code and imposed a sentence of five years imprisonment and four strokes of whipping. Stay of execution of the sentence was granted pending the disposal of the appeal, but unfortunately the petition of appeal was never filed by the appellant due to the fact that the sessions court judge never delivered his grounds of judgment. It was this court's view that it has a duty to look at the cold printed evidences without the benefit of the sessions court judge's observation of the demeanors of the witnesses and then ask itself the question whether the decision of the sessions court judge could be supported by the evidences adduced in the court below by drawing whatever inferences possible. Based on the said approach, this court dealt with this appeal by way of revision. Evidence adduced in the trial court below revealed that on 23 May 1997 at about 4.30pm, the complainant (PW1) was at the office of Maya Transportation, First Floor, Jong Chi Jui Building, Serian Bazaar, in the District of Serian where the accused holding a sharp blade against his neck had threatened to kill him if he did not give the accused the sum of RM10,000. The presence of the accused at PW1's office was allegedly witnessed by PW6. No police report of the incident was E F G H I

made until 26 May 1997. The appellant's defence was one of alibi and he had through his counsel given the statutory notice under s. 402A of the Criminal Procedure Code.

Held (setting aside the conviction):

(1) The explanation given by PW1 in lodging the police report three days after the incident (26 May 1997) was not reasonable. PW1 was an ex police officer for a span of 27 years with his last rank as a police sergeant. As an ex police officer, it was strange for him to say that he was afraid of lodging a report against the accused. Further, as an ex police officer, he ought to have known that he should have made the report as soon as possible. This failure to do so raised a doubt on the veracity of his evidence. There was no legal requirement for a police report to be made within 24 hours but in the circumstances, PW1 should have done so as he was not an ordinary lay person. (para 7)

(2) There was no mention of his neck injury, being slapped and his glass being broken to PW6 or in the police report. The failure to narrate the injury in the police report raised another doubt. There was no production of the broken glass in court which was rather strange. There was no legal requirement to state all the details in the police report but in this case PW1 was a former police. (para 7)

(3) There was a failure on the part of the prosecution in investigating the alibi defence of the accused. This was clear from the testimony of PW8 the investigating officer where he testified that he had acted on the report and made an arrest after instructions from his superior. He also testified that he had never checked the pocket diary of the accused. This was unsatisfactory investigation bearing in mind that the appellant had through his lawyer given three names to the prosecution in the statutory notice of alibi. (para 7)

(4) The prosecution had called two auxiliary officers (PW5 and PW7) from the Detention Simuja Camp, Serian to testify the whereabouts of the accused at the time of the offence. Neither PW5 nor PW7 had testified that the appellant had left the centre between 7.30am to 4pm. This was consistent with the contention of the appellant that he was at the material time still at the detention camp. (para 7)

(5) The onus was on the prosecution to prove its case beyond reasonable doubt throughout the case. There was no duty on the appellant to prove his innocence. His duty was to cast a reasonable doubt for a discharge and acquittal. In this court's view, he had done that. (para 7)

Case(s) referred to:
Azman Jamhuri v. PP [2001] 1 CLJ 539 HC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Penal Code, s. 394

For the appellant - Abdul Rahman
For the respondent - Fazillah Begum Abdul Ghani SFC

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Appeal

[1] This is an appeal by the appellant-accused ('the accused') against the decision of the learned Sessions Court Judge who had on 25 July 1998 found the accused guilty and convicted him of an offence punishable under s. 394 of the Penal Code and imposed a five years imprisonment and four strokes of whipping.

Background

[2] The charge against the accused reads:

> That you on 23rd May 1997 at about 4.30pm at the office of Maya Transportation, 1st Floor, Jong Chi Jui Building, Serian Bazaar, in the Ditrict of Serian, in the state of Sarawak, committed robbery of the property, to wit, cash in the sum of Ringgit Malaysia five hundred (RM500.00) and that whilst committing the said act you had voluntarily caused hurt to one TELOK SINGH (m) and you thereby committed punishable under did commit an offence punishable under section 394 of the Penal Code.

[3] The accused claimed trial to the charge and was convicted. Stay of execution of the sentence was granted pending the disposal of appeal. Unfortunately the petition of appeal was never filed by the appellant due to the fact the Sessions Court Judge never delivered his grounds of decision. He is now no longer in the legal services; hence no grounds of decision will be forthcoming. Ian HC Chin J was faced with exactly the same dilemma in *Azman Jamhuri v. PP* [2001] 1 CLJ 539 and this is what he said at pp. 544-545:

> What remains to be dealt with is whether the present case is an appeal properly before this court. Now, s. 308 of the Criminal Procedure Code requires the "appeal record" to be sent to the High Court and it should consist of: (1) a copy of the record of proceedings, (2) a copy of the grounds of decision, (3) a copy of the notice of appeal and (4) a copy of the petition of appeal. The grounds of decision is not with the record of the appeal and therefore s. 308 has not been satisfied. Therefore, this appeal could not be regarded as a proper appeal and the "appeal record" should be sent back to the Sessions Court for the judge to give his grounds of decision and thereafter to transmit the same to the High Court but, for the reasons I have stated above, it would be a pointless exercise. But the Supreme Court in *Jaafar bin Abu & Anor v. PP* [1988] 1 CLJ 595 was of the view that "there is no reason why an appellate court cannot hear an appeal without the benefit of grounds of judgment". In that case, involving a conviction for a corruption offence and where the grounds of judgment was not available because the officer had left the service, two questions of law were referred to the Supreme Court for a decision, *viz.*:
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> (a) When there is an appeal pending and no grounds of judgment are available, can the High Court act in revision? and
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> (b) If the answer is yes, what is the proper order the learned judge should make.
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> The court answered the first question in the affirmative and as regard the second, the court said that the High Court judge is entitled to make such order as he deems fit in the circumstances. In that case the High Court judge acted by view of revision to uphold the conviction. It will be noticed that the question of whether the High Court can hear an appeal without the grounds of judgment was never referred to the Supreme Court for a decision and therefore what the Supreme Court said there must

be regarded as having been said in obiter. In my view, it does not really matter whether you act as if the case is under appeal or in revision; it calls for the same consideration which I will refer to later. I prefer to deal with the present case in revision since there are no grounds of decision and s. 308 had not been complied with.

Revision

[4] In dealing with this appeal by way of revision, I ask myself the question how I should approach this revision. Ian HC Chin J in the just quoted case said that he was not allowed "at this stage of the proceedings to make any finding of facts and much will depend on what crucial findings had been made by the judge." Starting on that premise he then went on to set out the defense of the accused/appellant and then at p. 548 concluded as follows:

> It was opened to the judge to reject those evidence of the defense but with sufficient reason. Unfortunately, though the defense was disbelieved, no reasons were given. Those few statements of the judge, above, which he made in his ruling do not make for a "speaking judgment" and there are no grounds of decision.
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> As for the second charge, there is no evidence led as to how that black plastic bag came to be in the part of the house where it was found. Since the house can be accessed by so many people, possession by the accused must be established and there is no evidence of that. *In view of the accused's denial of any knowledge of it, the judge will have to say why he did not believe the accused and why the defence has not created any reasonable doubt on the case of the prosecution. This has not been done. In the end I am left with the conclusion that the conviction is not safe.* (emphasis added)

If one takes the learned judge's approach to its natural conclusion, all appeals under such circumstances would be allowed as there invariably would be no "speaking judgment".

With respect I disagree with that approach. It is my view that the court has a duty to look at the cold printed evidences without the benefit of the Sessions Court Judge's observation of the demeanors of the witnesses and then ask itself the question whether the decision of the Sessions Court Judge can be supported by the evidences adduced in the court below by drawing whatever inferences possible.

A Based on that approach I now deal with this appeal by way of revision.

Section 394 Penal Code

B I start off by looking at the essential ingredients of s. 394 of the penal code which are as follows:

1. That the accused committed robbery on the complainant (PW1) and

C 2. That the accused voluntarily caused hurt to PW1 in doing so.

[5] Evidence adduced in the trial court revealed that on 23 May 1997 at about 4.30pm, the complainant one Telok Singh (PW1) was at the office of Maya Transportation, 1st Floor, Jong Chi Jui Building, Serian Bazaar, in the District of Serian where the D accused holding a sharp blade against his neck had threatened to kill him if he did not give the accused the sum of RM10,000. The presence of the accused at PW1's office was allegedly witnessed by PW6. No police report of the incident was made until 26 May 1997. PW1 was a police officer for 27 years with his last rank of E a Sergeant.

[6] The appellant's defense was one of alibi and he had through his counsel given the statutory notice under s. 402A of the Criminal Procedure Code which is contained in a letter dated F 16 June 1998. In that letter he gave three names, EPC Yusri bin Zainuddin, EPC Mohd Jumadi and Maimunah binti Bolok to the DPP.

Findings Of The Court

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[7] Having scrutinized the notes of proceedings thoroughly with care, I am of the view that based on the evidence adduced in the court below it is not safe to convict the accused and my reasons are these:

H 1. The explanation given by PW1 in lodging the police report three days after the incident (26th May 1997) was not reasonable. PW1 was an ex police officer, in fact for a span of 27 years with his last rank as a police sergeant. As an ex police officer, I find it strange for him to say that he was I afraid of lodging a report against the accused. Further from the evidence, one can see that he still had friends in the

police force who could help him if he needed protection. As an ex police he ought to have known that he should have made the report as soon as possible. This failure to do so raises a doubt in my mind on the veracity of his evidence. I am fully aware that there is no legal requirement for a police report to be made within 24 hours but in the circumstances which we have here; PW1 should have done so as he is not an ordinary lay person. He was as stated earlier an ex police with immense experience in this sort of matter.

2. There was no mention of his neck injury, being slapped and his glass being broken to PW6 or in the police report. Human nature would tell you that if one had been hurt and robbed, one would have immediately told PW6 what had happened prior to his arrival. This failure also raises a doubt in my mind. The failure to narrate the injury in the police report raises another doubt. There was no production of the broken glass in court which I find strange. Again I am fully aware that there is no legal requirement to state all the details in the police report but in this case PW1 was a former police and a medical report had been obtained by him prior to the police report.

3. The failure of the prosecution in investigating the alibi defense of the accused. This is clear from the testimony of PW8 the investigating officer where he testified that he acted on the report and made an arrest after instructions from his superior. He also testified that he never checked the pocket diary of the accused. This is unsatisfactory investigation bearing in mind that the appellant had through his lawyer given three names to the prosecution in the statutory notice of alibi. In *Vasan Singh v. PP* [1989] 2 CLJ 402; ([1989] 1 CLJ (Rep) 166), Harun SCJ at p. 405 (p. 169) had this to say:

> The primary purpose of an alibi notice is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before the trial of making such investigations as they think fit. It may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case.

A The least the prosecution could have done was to interview the names contained in the notice. In fact the appellant had taken a risk in giving the notice as he had testified that two of those named had a grudge against him. The prosecution had called two auxiliary officers (PW5 and PW7) from the
B Detention Simuja Camp, Serian to testify the whereabouts of the accused at the time of the offence. Neither PW5 nor PW7 had testified that the appellant had left the centre between 7.30am to 4pm. This is consistent with the contention of the appellant that he was at the material time
C still at the detention camp.

It must not be forgotten that the onus was on the prosecution to prove its case beyond reasonable doubt throughout the case. There was no duty on the appellant to prove his innocence. His
D duty was to cast a reasonable doubt for a discharge and acquittal. In my view he has done that.

Conclusion

[8] For all the reasons stated above, I exercise my power of
E revision and set aside the conviction.

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